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Is the FCC's "Third Way" the Right Way on Net Neutrality? Or a Dead End?

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Since our last post on net neutrality, the debate has focused on the administrative questions as to who will set the guidelines for internet regulations and how those regulations will be implemented. Since the D.C. Court of Appeals ruled that the FCC did not have the authority to regulate Comcast's network management practices under Title I of the Communications Act, as predicted, the Commission has sought alternative ways to reclassify broadband services in order to extend regulatory authority over ISPs under the Act. Last week, by a 3-2 vote, the FCC moved one step closer to reclassifying broadband to reestablish authority over ISPs. In its meeting, the FCC released a Notice of Inquiry to seek comment on the proposed changes for broadband regulation. Among the suggested changes is FCC Chairman Genachowski's proposal, dubbed the "Third Way," a method that would classify only the transmission component of broadband access service as a telecommunications service. Doing so would render the transmission component subject to Section 202(a) of the Communications Act, which forbids any common carrier to "make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services with like communication service." In effect, the "Third Way" would enable the FCC to implement net neutrality regulations on the transmission component of an ISP service without otherwise extending the full brunt of Title II telecommunications service regulations to the information service components of an ISP. Since the proposal was initially released, advocates on both sides of the net-neutrality debate have voiced concerns that this reclassification may be beyond the Commission's authority. Just weeks ago, 171 Republican and 73 Democratic Congressmen urged the Commission not to take unilateral action in creating a new regulatory scheme by reclassifying broadband as a modified Title II telecommunications service. Instead, they are insisting that any such classification change be implemented through legislative channels. The FCC's recent action appears to be a polite "No thanks" to those Members of Congress. The FCC has explained that there is a legal basis for reclassifying broadband without legislative action. A statement by the Commission's General Counsel pointed out that in his dissent in *National Cable and Telecommunications Association v. Brand X Internet Services, Inc.*, Justice Scalia said that the "computing functionality" and "broadband transmission component" of an ISP must be acknowledged as "two separate things," the former an unregulated service under Title II and the latter a telecommunications service which could, in Scalia's view, be a regulated Title II service. In the FCC's view,

Scalia's dissent is "consistent with, although not compelled by, the majority opinion in Brand X." The FCC is therefore confident that the Third Way approach will pass judicial scrutiny. The reclassification of the transmission component under Title II would not place immediate restraints on ISPs, but some ISPs and analysts are concerned that this would lead to further price regulations that could potentially thwart investment opportunities in the broadband space. AT&T explained that the Notice of Inquiry issuance is disconcerting as "it will create investment uncertainty at a time when certainty is most needed. It will no doubt damage jobs in a period of far-too-high unemployment." Joining the opposition, Verizon suggested that these measures will have "negative consequences for online users and the Internet ecosystem would be severe and have ramifications for decades." While it is difficult to predict the precise impact additional regulations might have, the reclassification would undoubtedly extend regulatory authority to the Commission and leave ISPs susceptible to greater oversight. In an effort to combat increased agency regulation, ISPs have suggested alternatives that allow for more flexible standards and less regulatory control of network management. Comcast, in its reply comments, insisted that the FCC "should not adopt an absolute ban on discrimination" as this would "prohibit 'socially beneficial discrimination' and stifle innovation and investment." Instead, Comcast explains that the rules should allow the Commission the power to supervise ISPs' practices and address practices that are questionable while still giving ISPs "the flexibility to innovate and experiment with technologies and business models." Comcast further suggests that the regulations created by the FCC should operate in conjunction with independent third-party expert groups to "understand, refine, and address the various technical issues underlying key policy determinations." This would create industry-wide cooperation by integrating practical standards with current FCC policies. Last week, in an effort to reclaim control of the network management debate, notable industry executives formed the Broadband Internet Technical Advisory Group (BITAG). The purpose of the group is to "develop consensus on broadband network management practices or other related technical issues that can affect users' Internet experience." The group is poised to inform and advise governmental agencies on technical and operational issues facing internet service and content providers that will help establish network management policies. Regardless of the outcome of the regulatory debate, ISPs must continue managing bandwidth congestion within FCC policies and constraints. Depending on the breadth of expansion of the regulatory controls, ISPs may seek alternative pricing structures as a way of managing network traffic without employing intense discriminatory network-management practices and running afoul of net neutrality principles or regulations. Indeed, AT&T's recent decision to eliminate "all you can eat" mobile data plans in favor of metered billing was intended, in part, to rein in the small number of users that consume a disproportionate amount of data. AT&T hopes the new scheme will alleviate stress on the networks and help manage congestion. This move may change the entire economic model for the wireless industry as other wireless providers follow suit. Congress will obviously continue to debate the implications and necessities of having an unelected agency construct overarching broadband regulations. However, it is clear that amending the Communications Act will take time and be especially difficult during an election year. The FCC is accepting comments on the proposed reclassification methods through July 15th. We're not sure whether the coming weeks and months will provide much clarity, but we anticipate that there will be opportunities amidst the uncertainty.

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